84-916

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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

GERRY W. MONROE, *et al.* and LEE F. HIGMAN, *et al.*,
Cross-Petitioners,

v.

UNITED AIR LINES, INC. and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

CONDITIONAL CROSS-PETITION OF GERRY W. MONROE *et al.* and LEE F. HIGMAN *et al.* FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in an age discrimination case involving both denials and affirmative defenses, evidence of an employer's discriminatory motive remains relevant at all times.

2. Whether the court of appeals exceeded the bounds of appropriate judicial review in its treatment of the BFOQ instruction.

PARTIES

Gerry W. Monroe *et al.* and Lee F. Higman *et al.* were plaintiffs-appellees,* the Equal Employment Opportunity Commission was an intervening plaintiff-appellee, and United Air Lines, Inc. was defendant-appellant. Air Line Pilots Association, International was a non-liability defendant-appellant. All were parties to the decision sought to be reviewed here.

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* The Monroe-Higman parties are:

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Respondents.

CONDITIONAL CROSS-PETITION OF GERRY W. MONROE *et al.* and LEE F. HIGMAN *et al.* FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Cross-petitioners Gerry W. Monroe *et al.* and Lee F. Higman *et al.* respectfully request that this conditional cross-petition for a writ of certiorari be granted in the event that the Court grants the petition of United in No. 84-774 which the Monroe-Higman parties have opposed.

OPINION BELOW

The opinion of the court of appeals is officially reported at 736 F.2d 394 and appears in the Appendix to United's petition in No. 84-774 at page A-1, which is cross-referenced herein.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1984. Rehearing was denied on August 10, 1984. This conditional cross-petition is timely filed pursuant to Rule 19.5. United's petition in No. 84-774 was received on November 9, 1984. This Court has jurisdiction over the cross-petition pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the district court was based on 29 U.S.C. §§ 216, 217, 626(c) and 28 U.S.C. § 1331.

STATUTES INVOLVED

Sections 4(a)(1) and (2) of the Age Discrimination in Employment Act ("ADEA") provide (29 U.S.C. § 623 (a)(1) and (2)):

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . .

Section 4(f)(1) of the ADEA provides (29 U.S.C. § 623(f)(1)):

> It shall not be unlawful for an employer, employment agency or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . .

STATEMENT OF THE CASE

This case, reported to be the largest age discrimination action tried before a jury, challenges (1) United's refusal to allow cross-petitioners and others to work in the position of flight engineer (called Second Officer on United) beyond age sixty and (2) United's mandatory retirement of all flight deck crewmembers at age sixty. The flight engineer position is not covered by the FAA's "Age 60 Rule" barring service as a Captain or co-pilot after sixty. 14 C.F.R. § 121.383(c). The 30 *Monroe* petitioners are career flight engineers for United who sought to continue in that position. The 85 *Higman* petitioners worked as Captains, First Officers, or flight instructors before age sixty, and sought to transfer to flight engineer.

United defended its actions by denying it had unlawfully discriminated on the basis of age, by asserting that an age below sixty was a "bona fide occupational qualification" (BFOQ) (29 U.S.C. § 623(f)(1)) for the position of Second Officer, and by asserting that the refusal to allow the *Higman* petitioners to transfer to the flight engineer position was based on "reasonable factors other than age" (*id.*).

Following over six weeks of testimony, the jury found that United had willfully violated the ADEA and had not prevailed on its defenses. The trial court also issued findings, based on an independent review of the evidence, that United had willfully violated the ADEA and had not established its BFOQ defense. The court issued a series of opinions ordering equitable relief, including the reinstatement of electing plaintiffs.

The court of appeals found that plaintiffs had presented sufficient evidence to support findings that an incapacitated flight engineer would not endanger the flight and that United has the capacity to deal with Second Officers over age sixty on an individualized basis

(A-16 to A-19). The court also found that plaintiffs' evidence on the transfer issue was "sufficient to support a finding that United administered the seniority system in a discriminatory manner" (A-22). The court nevertheless reversed and ordered a new trial, finding error in two of the jury instructions.

First, the court held that the jury had been erroneously instructed on the BFOQ instruction (A-7 to A-11). Second, the court held that the pretext instruction was erroneous (A-12 to A-15). Equating "pretext" with "animus," the court stated that pretext "is properly used only in establishing a claim of discrimination" and "does not come into play in evaluating an affirmative defense" (A-14). With respect to the BFOQ issue, the court stated that "objective" evidence ultimately controls and that "United's animus toward older workers becomes irrelevant" (A-15). As to the transfer issue, the jury on retrial is to determine "whether United has discriminated, but not whether United harbors any animus toward older pilots" (A-22).

In this case no bright line can be drawn between "subjective" and "objective" evidence, on either the BFOQ or the transfer issue. United's trial strategy on the BFOQ question was to attempt to tie the refusal of plaintiffs' age sixty Second Officer employment requests in 1978 to a policy decision in 1950 to require "all" flight deck crewmembers to retire at age sixty. The jury had to weigh this contention in light of evidence that United's prior mandatory retirement policy had its genesis in the pension plan, not safety concerns, and that when the ADEA was amended in 1978 United realized that it had to come up with new justifications for mandatory retirement of Second Officers.

The distinction between subjective and objective evidence was further blurred because United's principal medical expert was also a corporate official whose testimony had to be weighed under the same principles as any

other real party in interest. He was not involved in the original decision to establish age sixty as the mandatory retirement date. In 1959, he wrote in favor of mandatory retirement, noting that arbitrary age limits are beneficial to financial planning. His testimony that age sixty flight engineers posed unacceptable safety risks had to be weighed against the lengths to which he and United had gone to recertify younger, high risk pilots following myocardial infarction, eye loss, serious head injuries, various emotional and psychological illnesses, and alcoholism. Despite United's attempt at trial to equate the risks of the Second Officer job with those of the pilot job, United's expert had conducted a study in 1976 and concluded that the incapacitation of the Second Officer is less critical than that of a front-seat pilot, and that the practice of restricting post-heart attack victims to flight engineer duties implies "the assignment of the increased medical risk crew member to the least critical position."

The bona fides of United's BFOQ defense also had to be weighed in light of United's attempts to bootstrap its retirement of flight engineers through use of the FAA's Age 60 Rule for pilots. At first United denied plaintiffs' requests on the basis that the FAA rule actually applied to United's Second Officers, although internal company documents showed that United never believed this. United then tried to convince the FAA to rule that its regulation applied and, failing that, made efforts by itself and with other airlines to have the regulation extended to flight engineers. During the litigation, United even surveyed the duties of flight engineers on airlines such as TWA and American which did not have an age sixty limit in the hope of showing that United's Second Officers "are much more involved in piloting operations," but the survey did not lead to the "conclusion we would like to reach."

Similarly, on the transfer issue there was no clear line between the evidence on whether United's downgrading

restrictions were truly age neutral or whether United's decision not to allow pilots approaching age sixty to transfer was due to its discriminatory animus. Among other things, the jury had to weigh evidence about the contractual "catch-all" provision which was freely applied to younger pilots desiring a transfer and which could have been applied to age sixty pilots but was not. The jury also had to weigh United's contention that allowing medical downgrades to disabled younger pilots was a temporary measure against the evidence that in practice United allowed such pilots to transfer to flight engineer even if they could not regain a pilot position.

REASONS FOR GRANTING THE WRIT

I. EVIDENCE OF DISCRIMINATORY MOTIVE IS RELEVANT AT ALL STAGES OF AN ADEA ACTION

The ADEA's fundamental purpose is "to prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621(b). The primary prohibition in the Act is to make it unlawful to discriminate "because of . . . age." 29 U.S.C. § 623(a). Yet the Seventh Circuit's opinion establishes a framework wherein an employer's "animus" becomes irrelevant at different points in the jury's deliberations. There is no basis for this departure from the basic structure of the Act. Certiorari should be granted on this important question of federal law to affirm that evidence of motive never drops from an ADEA case.

The Seventh Circuit's opinion proceeds from an erroneous application of the prima facie case formula in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Recognizing the difficulty of proving discriminatory animus directly, this Court has formulated a method by which an individual can establish by inference a rebuttable presumption of intentional discrimination. In the *McDonnell Douglas* sequence, the presumption of discrimination is rebutted if the employer articulates a

legitimate nondiscriminatory reason for its action, and the case then moves to the issue of pretext.

Pretext has developed into a term of art used in two senses. First, plaintiff may show that the employer's proffered reason is but a mask or cover-up for discrimination. Alternatively, plaintiff can offer proof to show that the stated reason is unworthy of credence. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Whichever method is used, the plaintiff's burden is to demonstrate that the proffered reason is not the true reason for the employer's decision. The pretext showing merges with the plaintiff's ultimate burden of proving that unlawful discrimination has occurred. *Id.*

The court of appeals here took the matter one step further by stating that "under a proper pretext instruction . . . the jury will determine whether United has discriminated, but not whether United harbors any animus toward older pilots" (A-22). This analysis is wrong. This Court has made clear that evidence of animus in plaintiff's case remains relevant at the pretext stage. *Burdine*, 450 U.S. at 255 n.10. The *McDonnell Douglas* formulation should not cause discrimination questions to be decided any differently from other ultimate fact questions. The employer's motivation remains relevant throughout, because the central issue the trier of fact must decide is "which party's explanation of the employer's motivation it believes." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

The presence of a "bona fide occupational qualification" (BFOQ) or other affirmative defense in the case is no reason to disregard relevant evidence of employer motivation at any point in the deliberative process. First, where there are denials of discrimination mixed in with affirmative defenses, as here (*see* A-12), the factfinder still needs to decide the basic discrimination question. *See*

Burdine, 450 U.S. at 253. Second, regardless of whether or not it is appropriate to use the word "pretext" to refer to plaintiff's rebuttal to defendant's affirmative defenses, the employer's motivation properly remains in issue in rebutting such defenses. *Adams v. James*, 526 F. Supp. 80 (N.D. Ala. 1980) (BFOQ); *Smart v. Porter Paint Co.*, 630 F.2d 490 (7th Cir. 1980) (bona fide pension plan defense); *Morelock v. NCR Corp.*, 586 F.2d 1096 (6th Cir. 1978) (bona fide seniority system defense); *Wright v. Olin Corp.*, 697 F.2d 1172, 1191-92 (4th Cir. 1982) (business necessity defense); *see Criswell v. Western Air Lines, Inc.*, 709 F.2d 544, 552-56 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 80 (1984) (No. 83-1545) (reasonable factors other than age defense; "pretext" in the sense of rebuttal to affirmative defenses).

With respect to the BFOQ defense, the court of appeals stated that the BFOQ ultimately depends on an "objective" evidence test, in which the employer's "animus toward older workers" and "subjective beliefs or good faith" become irrelevant. This interpretation is contrary to the language of the statute. The "bona fide" in "BFOQ" means "in or with good faith, honestly, openly, and sincerely." Black's Law Dictionary (5th Ed. 1979). Although a good faith belief by itself is insufficient to establish a BFOQ, *see Orzel v. City of Wauwatosa*, 697 F.2d 743, 755 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983), there is no basis for removing this element from defendant's BFOQ burden of proof.

The employer's good faith and its proof of a BFOQ by objective evidence are thus dual essential elements. Correspondingly, plaintiffs should not be limited in rebutting a BFOQ to either "subjective" or "objective" evidence. Indeed, in this case United placed its good faith in the forefront of the BFOQ issue. To restrict plaintiff's rebuttal to "objective" evidence in these circumstances turns *McDonnell Douglas* on its head and incorrectly "treat[s] discrimination differently from other ultimate questions of fact." *Aikens*, 460 U.S. at 716.

II. THE TREATMENT OF THE BFOQ INSTRUCTION RAISES FUNDAMENTAL ADMINISTRATION OF JUSTICE QUESTIONS

The Seventh Circuit's treatment of the BFOQ instruction raises important questions regarding the role of appellate courts in reviewing jury instructions. From the standpoint of sound judicial administration, this Court should grant certiorari to review three principles violated by the Seventh Circuit: (1) the need to read jury instructions as a whole; (2) the requirement that a party be harmed by an instruction to gain reversal; and (3) the requirement to preserve error by objecting to instructions in the trial court.

The Court of Appeals held that the BFOQ instruction should have followed *Orzel v. City of Wauwatosa*, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983), a case decided three months after the jury was instructed here (A-11). Plaintiffs' proposed BFOQ instruction tracked *Orzel* perfectly. United objected to this instruction on the basis that it was not the law of the circuit. It tendered more than twenty BFOQ instructions based on the more lenient standard derived from *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

The trial court accommodated United by writing a BFOQ instruction that combined elements of both the *Orzel* and *Greyhound* tests and permitted United to win on either one. The court of appeals readily noted that this "provided United with a chance of winning [under the *Greyhound* test] to which it was not entitled" (A-10 to A-11).[1] This should have been sufficient, under well-

[1] Under *Orzel*, United would have had to prove *both* that the flight engineer job is reasonably necessary to safe transportation of passengers *and* that it could not determine the fitness of sixty year olds on an individualized basis. The court's instruction permitted United to prevail on its BFOQ defense even if the jury answered the first part of the test in the negative.

established principles, to preserve the jury verdict since the instruction could not have prejudiced United. *See Smith v. University of North Carolina*, 632 F.2d 316, 333-34 (4th Cir. 1980); *Bridges v. Chemrex Specialty Coatings, Inc.*, 704 F.2d 175, 178 (5th Cir. 1983); *General Insurance Co. of America v. Hercules Construction Co.*, 385 F.2d 13 (8th Cir. 1967).

The court of appeals found the BFOQ instruction erroneous because it used the words "different standard" to introduce the *Orzel* prong of the instruction. It viewed these words not as an introduction to a different *legal* standard but rather as a direction that the jury consider different *evidence*. This holding warrants review by the Court for several reasons. First, the ruling runs afoul of universally-accepted standards for review of jury instructions. The jury charge is to be considered as a whole, in connection with the contentions of the parties, and from the standpoint of the jury. *Shelak v. White Motor Co.*, 581 F.2d 1155 (5th Cir. 1978); *Charles A. Wright, Inc. v. F.D. Rich Co.*, 354 F.2d 710 (1st Cir.), *cert. denied*, 384 U.S. 960 (1966); *Honea v. West Virginia Pulp and Paper Co.*, 380 F.2d 704, 709 (4th Cir. 1967); *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir.), *cert. denied*, 419 U.S. 869 (1974).[2] There is nothing in the voluminous record to support the conclusion that the jury misunderstood the instruction. The question of whether United could determine the fitness of sixty year olds on an individualized basis was the principal BFOQ battleground at trial. It consumed thousands of transcript pages, including the testimony of six expert witnesses. Counsel in extensive closing argument

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[2] The court noted that jury instructions are to be evaluated as a whole. Yet it went on to state that "in the context of this case we will examine the instructions relating to each issue separately" (A-6). It gave no explanation for departing from normal appellate review standards.

on both sides spoke directly to the *Greyhound-Orzel* "fork in the road" aspect of the BFOQ instruction, and expressly told the jury that it was to consider all the same evidence under either standard (Tr. 6661, 6669, 6672, 6718, 6738-39, 6751).

Furthermore, United never objected to the "different standard" language in the trial court.[3] It is fundamental that a party may not assign error on a basis to which it has not objected. Rule 51 of the Federal Rules of Civil Procedure was designed to prevent exactly what has occurred here. Its purpose is to "afford the trial court an opportunity to correct any error in the instructions and also to prevent the losing party from obtaining a new trial through relying on a possible error in the original trial." *Johnson v. Houser*, 704 F.2d 1049, 1051 (8th Cir. 1983).

The decision below permits a party to barrage a court with erroneous instructions, procure flawed instructions that increase its chances of prevailing, and then obtain reversal of an adverse verdict by claiming error on grounds not raised below. The irony is that plaintiffs proposed the correct instruction, prevailed despite a charge that was overly generous to United, but now must retry the case because of United's perseverance in leading the district court into error. Certiorari should be granted on this important question of judicial administration.

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[3] Had United objected to the phrase "different standard," the court easily could have clarified the instruction by inserting the word "legal" and reminding the jury, as it had instructed generally (Tr. 6796), to consider all of the evidence in determining the BFOQ issue.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this conditional cross-petition be granted in the event United's petition in No. 84-774 is granted.

Respectfully submitted,

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Respondent, United Air Lines, Inc. ("United"), respectfully prays that the Conditional Cross-Petition for Certiorari of Gerry W. Monroe, *et al.*, and Lee F. Higman, *et al.*, served on United on December 12, 1984, be denied.

Statement of the Case

The proceedings below have been adequately described in the Petition For Certiorari filed by United in No. 84-774 and the Cross-Petition For Certiorari of Air Line Pilots Association, International (No. 84-958) filed in response thereto. The Statements of the Case therein are incorporated here by reference.

Reasons This Conditional Cross-Petition Should Not Be Granted

I. "Discriminatory motive" is a meaningless redundancy when what is at issue is an express age-based BFOQ rule that is discriminatory on its face and intended to be so. This is essentially the position which the Seventh Circuit took in connection with the erroneous instructions for which it ordered a new trial. (Pp. A7-A11, A12-A15 of United's Petition for Certiorari in No. 84-774.) Animus against over-60 employees and pretext to hide age discrimination are concepts irrelevant to a BFOQ defense of an explicit under-60 age rule.

To make evidence of a discriminatory motive relevant at all stages of a suit charging violation of the ADEA by an express age-based BFOQ rule would be, in effect, to direct a verdict for plaintiffs.

Cross-Petitioners' first point is without substance.

II. The Cross-Petition misstates the treatment of the BFOQ instruction in the proceedings below. The so-called *Tamiami-Orzel* test, as stated by the Seventh Circuit some three months after the jury was instructed here, is not the different animal claimed by Cross-Petitioners from the *Greyhound* test which was tendered by United as the conceded law of the Seventh Circuit at the time of submission to the jury here. Both tests are the same in respect to the critical aspect that the BFOQ defense is established by showing a factual basis for *reasonable belief* by the common carrier that a blanket age rule is the prudent way to assure against untoward incapacitation in jobs related to the safe carriage of public passengers. *Orzel* v. *City of Wauwatosa Fire Dept.*, 697 F.2d 743, 753 (7th Cir. 1983), *cert. den.* 104 S.Ct. 484 (1983); *Hodgson* v. *Greyhounds Lines, Inc.*, 499 F.2d 859, 863, 865 (7th Cir. 1974), *cert. den.* 419 U.S. 1122 (1975). See also, Brief of Petitioner in No. 83-1545, *Western Air Lines, Inc.* v. *Criswell*, pp. 37-42; Cross-Petition Of Air Line Pilots Association, International For Writ of Certiorari to the

United States Court of Appeals for the Seventh Circuit, No. 84-958, *Air Line Pilots Association, International* v. *Higman, et al., Gerry W. Monroe, et al.*, pp. 20-24.

Cross-Petitioners erroneously assume (p. 9) the correctness of their proffered *Tamiami-Orzel* instruction. However, that instruction omitted the essential factor that the BFOQ defense can be established—in the situation where age bears a reasonable relationship to the essential nature of the airline's business of safely carrying passengers—simply by proof of a factual basis for *a reasonable belief* that future assurance against incapacitation after age 60 cannot be determined on an individualized basis. *See, e.g., E.E.O.C.* v. *Missouri State Highway Patrol,* BNA Daily Labor Report, 11-26-84, D-1, at pp. D-2, D-5 (8th Cir. 11/12/84).

As against the too rigid instruction proferred by Cross-Petitioners the reasonable belief standard of *Greyhound* was quite properly submitted by United. The problem was created by the trial judge himself who undertook to draft his own hybrid instruction and who, in so doing, ended up with the patently misleading instruction which the Seventh Circuit held to be reversible error. Cross-Petitioners' claim that this raises a question involving the fundamental administration of justice borders on the ridiculous.

Finally, the question of the appropriate BFOQ instruction applicable to ADEA suits against commercial airlines' age-60 cockpit rule for flight engineers will presumably be resolved by this Court's forthcoming decision in *Western Air Lines, Inc.* v. *Criswell,* No. 83-1545, set for argument January 14, 1985.

Conclusion

For the foregoing reasons, the Conditional Cross-Petition for Certiorari of Gerry W. Monroe, *et al.*, and Lee F. Higman, *et al.*, should be denied.

Respectfully submitted,

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